No. 370

Office Supreme Court, U.S.
FILED
AUG 11 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO AND ITS LOCAL 689,

Petitioners,

v.

THE PHILIP CAREY MANUFACTURING COMPANY, MIAMI CABINET DIVISION, AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment in this case of the United States Court of Appeals for the Sixth Circuit.

Opinions Below

The Intermediate Report of the Trial Examiner appears at pp. 11-72 of the Record. The Decision and Order of the National Labor Relations Board (R. pp. 3-11), printed

in Appendix A hereto, *infra*, p. 19, is reported in 140 NLRB No. 90. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 27, is reported in 331 F. 2d 720.

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were entered on March 31, 1964. Petitions for rehearing filed by the petitioners and by the National Labor Relations Board were denied on May 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the court below erred in refusing to enforce a Labor Board order that an employer remedy his refusal-to-bargain violation by bargaining with the union, because of the expiration of the certification year and because the union allegedly lost its majority status prior to and not as a result of the employer unfair labor practice.

2. Whether an employer bargains with the good faith required by the Labor-Management Relations Act when it presents a now and forever package proposal of benefits which (a) would have been offered to the employees whether or not they had voted for union representation, (b) was unrelated to prior union demands, (c) left many employees worse off than they would have been had the union not been recognized, and (d) was designed to complete, not initiate, the negotiations.

3. Where an employer injects the inflammatory and diversionary issue of super-seniority for strike replacements into the negotiations, does the employer who continues to insist upon its super-seniority proposal as a condition of strike settlement violate his statutory obligation to bargain in good faith (1) on or after the union first rejects the

proposal as impossible (as contended by the petitioners), or (2) three months later when negotiations on this score are terminated (as held by the court below).

Statute Involved

The statute involved is the Labor-Management Relations Act, 1947, 29 U.S.C. § 151 et seq., pertinent provisions of which are set forth in Appendix C, *infra*, p. 54.

Statement

This case challenges novel but infectious employer techniques of anti-union bargaining which, if left unchecked, might sound the death knell to the practices and procedures of collective bargaining as now known. Of equally devastating impact on collective bargaining is the refusal of the court below [which had jurisdiction pursuant to Sections 10(e) and (f) of the Labor Act, 29 U.S.C. § 160(e) and (f)] to enforce the Labor Board order that the employer remedy its unfair labor practice by resuming bargaining sessions with the union. A brief chronology of the factual highlights will put the issue in perspective.

1. *The UAW Certified on March 17, 1960, After Bitter Election:*

On March 17, 1960, the petitioners (hereafter referred to as "UAW") were certified as the collective bargaining agent for the employees of The Philip Carey Manufacturing Company (Miami Cabinet Division) (hereafter referred to as "Employer") after winning (by vote of 122 to 106) a bitterly contested NLRB election. During the election, the Company officials stressed the strike record of the UAW and portrayed in graphic terms the hardships and sufferings that accompany strikes. Workers were told that the UAW-CIO "is not and never will be a good

representative for the people of Miami Cabinet;" and that the Company officials "have no faith and no confidence in the United Automobile Workers outsiders." (R. 17)

2. *Ten Bargaining Sessions Followed With Little Progress:*

From April 18 to July 28, there were ten bargaining sessions. (R. 17) These consisted largely of the UAW's presentation and support of its demands. Apparently, no progress was made during this period, except on the subject of a grievance procedure. (R. 18)

3. *On July 28, The Employer Submitted a Package Proposal Unrelated to the Prior Bargaining and Which Left Employees Worse Off Than Before the UAW Was Elected:*

On July 28, the Employer submitted his first and final package proposal. (R. 19-20) The economic side of the proposal called for a nine-cent-an-hour general increase. (R. 35) This was larger than the wage increases at the other plants owned by Employer, but this differential was in keeping with the historical practice of the Employer's wage structure. (R. 35) The economic package was unrelated to the demands of the UAW. Indeed, the wage increase was based on the results of an Employer study of area rates "in accordance with the Company's practice in prior years." (R. 35) In fact, the Employer officials testified and so informed the employees by personal letter that this economic gain would "have been offered even if there had been no union." (R. 34)

The proposal was sweetened with an arbitration agreement and a "check-off" provision (R. 35) but undermined by two retrogressive changes in existing provisions. The first adverse change related to temporary transfers. (R. 22) Prior to the advent of the UAW, the employees temporarily transferred to lesser skilled and lesser paid work continued to receive their normal rates of pay. The Employer proposal included the provision that thereafter

employees, when temporarily assigned to lower skilled jobs to avoid layoff, would receive the lower pay.[1] The second change related to accumulation of seniority. (R. 23) The past practice was to permit laid-off employees to accumulate seniority for six months, but thereafter forfeit all seniority rights. The new proposal was that the laid-off employee retain seniority rights for two years, but accumulate nothing. In a Company with steady employment, this was a disadvantage and deprival of employee rights.

4. *The Employer July 28 Proposal Was Then Announced As Final, and the Employer Refused to Budge From It During Subsequent Negotiations:*

Employer officials testified, and so informed the employees, that the July 28 proposals "were made to complete negotiations, not to start negotiations." (R. 19) One official testified that it was Company policy "to make its maximum offer first, so as to avoid giving a union credit for wresting from the Company concessions which it had intended to make, in any event . . . and in that way give the union credit for something that the company intended to do." (R. 20)

At the bargaining sessions subsequent to July 28, the UAW announced that it was "flexible" on all issues but the two "hard core" issues of temporary transfer and accumulation of seniority. The UAW explained that it could not "live with" its members if it accepted proposals offering less than past practices. (R. 24)

The Employer officials refused to budge.[2] In fact, they

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[1] Mr. Shepherd, an acetylene welder on the UAW bargaining committee, testified that he regularly received $2.19 an hour and often was transferred to spot welding when no acetylene welding work was available, which paid $2.05 an hour. His estimate was that, despite the nine-cent-an-hour increase, he would lose $3.00 a week if the UAW accepted the Employer package proposal. The UAW survey indicated that about 130 of the 220 plant employees similarly would be adversely affected. (R. 25)

[2] Although they did offer to restore *all* past practices, this would have eliminated the arbitration agreement and "check off" clause, and would have left the employees exactly where they would have been had they voted against the UAW. (R. 37)

had no authority under Company policy to make any concessions even had they thought concessions would benefit the Employer's interests. (R. 39-40)

The Trial Examiner ruled that the Employer's offer of July 28, and the Employer's refusal to make or consider any concessions thereafter, constituted a refusal to bargain in good faith. (R. 40) The Labor Board reversed this holding, and the Court of Appeals affirmed the Labor Board.

5. *The Employees Went On Strike and on September 26, the Employer Injected the Issue of Super-Seniority for Strike Replacements:*

On August 20, the membership of the union voted to strike at a subsequent and unannounced date. (R. 26) On September 6, union officials requested the Employer's president to participate in the negotiations on the two "hard core" issues (i.e., temporary transfers and seniority during lay-off) but the Employer president refused. Later that day, the union membership voted to begin the strike at midnight of September 6. (R. 26)

On September 26, the Employer wrote the striking union a letter (with copies to all employees) renewing the package offer of July 28 minus the "check-off" proposal, and in this letter the Employer warned that unless the offer was accepted by September 30, the Employer would begin hiring replacements with "special seniority rights for lay-off and recall purposes." (R. 27) This Court recently recognized that "super-seniority by its very terms operates to discriminate between strikers and non-strikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted." *NLRB* v. *Erie Resistor Corporation*, 373 U.S. 221, 231.[3]

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[3] Board Member Gerald Brown held that the letter of September 26 was a "threat to institute unlawful super-seniority unless striking employees would forego their lawful concerted action. Such threat clearly violated Section 8(a)(1)." The majority of the Labor Board disagreed

6. *The UAW Immediately Rejected the Super-Seniority Proposals, and Negotiations Bogged Down and Terminated Over This Issue:*

The UAW representatives immediately rejected the September 26 "super-seniority" proposal. In fact, on September 28, the UAW filed charges with the Labor Board that the "position of said employer in these respects was not bargaining in good faith . . . thus causing the employees of the employer to continue their strike." (R. 633). The Employer adhered to its proposal, and at the face-to-face meeting on October 7, the parties "were up one side of the ladder and down the other talking primarily about this special seniority." (R. 283)

The Employer began to hire replacements on October 12, and on October 22, the UAW asked for a meeting with the Employer's president. (R. 28) This request was rejected, and on October 29, the UAW representatives met with the Employer to announce that it could not agree to the super-seniority proposal. (R. 28) On November 22 and 23, there were further meetings at which the UAW agreed that it would accept all the Employer's proposals except for the super-seniority clause. (284a) The Employer rejected this conditional surrender, and on December 28, the parties met for a final time in 1960 still dead-locked on the super-seniority issue. (R. 30)

7. *In August, 1961, the Employer Withdrew Its Super-Seniority Proposal But Rejected the Strikers' Unconditional Offer to Return to Work:*

Nothing happened between December of 1960 when negotiations broke off and August of 1961. On July 31, 1961, the Labor Board handed down its decision in *Erie Resistor Corp.* that company insistence on a super-seniority pro-

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that the letter "was independently violative of Section 8(a)(1)," and the Court of Appeals did not pass upon this point squarely. (App. A., p. 23)

posal violates Sections 8(a)(1), (3) and (5) of the Act. Thereafter things happened rapidly.

On August 3, the UAW filed an unconditional offer to return to work on behalf of 122 named strikers. (R. 30-31) On August 9, the Employer replied that all but 15 of these employees had been replaced so could not be returned to their jobs. (R. 31) On August 10, the Employer withdrew its super-seniority proposal (R. 31) and there were two face-to-face meetings on August 23 and on September 7. (R. 32) The negotiations were fruitless when the Employer adhered to its refusal to rehire any of the strikers it had replaced during the strike. (R. 33)

8. *The Trial Examiner, the Labor Board, and the Court of Appeals Found an Unlawful Refusal to Bargain in the Employer's Insistence on Its Super-Seniority Proposal, but the Court Refused to Enforce the Labor Board Remedial Order that the Employer Resume Bargaining:*

The Trial Examiner held that the Employer insistence upon its super-seniority proposal after impasse was reached was an unlawful refusal to bargain, and he found that impasse was reached when negotiations broke off on December 28. (R. 48)

The Labor Board agreed with the Trial Examiner that "bargaining negotiations between the parties reached an impasse on December 28, 1960, because of the respondent's [Employer's] unlawful insistence upon the inclusion of its super-seniority proposal." (App. A, p. 22)

The Court of Appeals was also in agreement: "We approve the holding of the Board that the strike was converted into an unfair labor practice strike as of December 28, 1960." (App. B, p. 38) The Court enforced the Labor Board order that the "Company offer to twenty-eight employees who were replaced after the strike had been converted into an unfair labor practice strike on December 28, 1960, reinstatement to their former or substantially equivalent employment . . ."

The Court of Appeals, however, refused to enforce the Labor Board order that the Employer remedy its refusal to bargain violation by bargaining with the UAW upon request. The Court said that: "In view of the lengthy good faith bargaining which has transpired, the expiration of the certification year, and the Union's loss of its majority status, we hold that the Company is no longer required to bargain with this Union. This part of the order of the Board is set aside and enforcement of the Board's order in this respect is denied." (App. B, p. 50)

9. *The Court of Appeals Denied the Petitions for Rehearing Filed By the Labor Board and By the UAW:*

The Labor Board petitioned the Court of Appeals to grant a rehearing "with respect to that portion of its decision . . . which denied enforcement of the provision of the Board's order requiring the Company to bargain with the Union on request." The Labor Board (1) pointed out that the line of decisions relied upon by the court below had been recently "summarily reversed" by this Court in *Progressive Mine Workers* v. *NLRB*, 375 U.S. 396; and (2) pointed out that the two principal obstacles to fruitful negotiations—super-seniority and reinstatement of strikers—had now been removed by that Court's decision. The Labor Board urged that the UAW, "whose certification year was originally truncated by the Company's initial unfair labor practice, should have its 'fair chance to succeed', and to bargain collectively on behalf of the employees."

The UAW also filed a petition for rehearing on two grounds: first, that the mere injection of super-seniority into the bargaining was a *per se* violation of good faith bargaining—"the demand was provocative, disruptive and wholly extraneous to the permissible gamut of collective bargaining subjects . . . discriminatory in prospect and antagonistic;" and secondly, that because the super-seniority proposal "immediately became a major obstacle in

negotiations," the Employer's unlawful insistence occurred on October 7 (when the parties first met and made their positions clear) rather than on December 28 (when meeting terminated).

The Court of Appeals denied both petitions for rehearing. (R. Vol. II)

Reasons for Granting the Writ

I

THE REFUSAL OF THE COURT BELOW TO ENFORCE THE LABOR BOARD REMEDIAL ORDER THAT THE EMPLOYER BARGAIN WITH UAW UPON REQUEST (A) CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT, (B) CONFLICTS WITH THE UNIFORM PRACTICE OF THE OTHER COURTS OF APPEALS, AND (C) RAISES SERIOUS QUESTIONS CONCERNING THE ADMINISTRATION OF THE LABOR-MANAGEMENT RELATIONS ACT.

The court below agreed with the Labor Board that the Employer had engaged in unfair-refusal-to-bargain practices when it continued to insist upon a super-seniority clause after impasse was reached. But the court below refused to enforce the Labor Board remedial order that the Employer bargain with the UAW upon request. The Court reasoned that subsequent bargaining sessions would be a "futility" because (a) the UAW, through strike replacements, had lost its majority status prior to and not as a result of the Employer unfair labor practices, and because (b) there had been two fruitless negotiation sessions after the certification year had expired.[4]

A. The Decision Below Conflicts With Applicable Decisions of This Court.

The decision below conflicts with a host of decisions by

[4] The lower court's reasoning that the "certification year" extends only for one calendar year conflicts with the decisions by the Labor Board and by the Court of Appeals for the Fifth Circuit that the "certification year" extends for one year of actual bargaining. *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785; *N.L.R.B.* v. *Commerce Co.*, 328 F. 2d 600.

this Court that it is for the Labor Board, not for the reviewing court, to determine and fashion the appropriate remedial order: *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U.S. 512;[5] *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702;[6] *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563;[7] *Brooks* v. *National Labor Relations Board*, 348 U.S. 96.[8] More recently, in *National Labor Relations Board* v. *Katz*, 369 U.S. 736, the Company urged that "because of the lapse of time between the occurrence of the unfair labor practices and the Board's final decision and order, and because the union was repudiated by the employees subsequently to the events recounted in this opinion, enforcement should be either denied altogether or conditioned on the holding of a new election to determine whether the union is still the employees' choice as a bargaining representative." This Court in a footnote held that "The argument has no merit." 369 U.S. at 748, n. 16. And still more recently, in *National Labor Relations Board* v. *International Union, Progressive Mine Workers of America*, 375 U.S. 396, this Court granted certiorari and summarily reversed a refusal—because two years had elapsed since the employees changed union affiliation—to enforce a Labor Board order to bargain with the union representing the employees at the time of the employer unfair labor practice.

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[5] Board order to bargain enforced despite lapse of time and shift of membership to rival union subsequent to employer unfair labor practice.

[6] Board order to bargain enforced despite union loss of majority status due to replacements during delay following employer unlawful refusal to bargain.

[7] Board order to bargain enforced despite union loss of majority status and despite brief resumption of good faith but abortive bargaining after the certification year in compliance with Board order.

[8] Board order to bargain enforced despite union loss of majority status after election but prior to certification without the employer's fault.

B. The Decision Below Conflicts With the Almost Uniform Practices in Other Courts of Appeals.

The Court of Appeals for the Second Circuit [9] and the Court of Appeals for the Seventh Circuit [10] have recently and on rare occasions refused to enforce a Labor Board remedial bargaining order in situations where the employees had clearly repudiated the certified bargaining agent a long time earlier unless and until the union had been duly certified a second time as bargaining representative following a new election. This line of decisions culminated in the *Progressive Mine Workers* case, which, as indicated above, was summarily reversed in a *per curiam* opinion this past term.

Apart from this short-lived aberration, the uniform practice in the Courts of Appeals is to enforce Labor Board orders that the employer remedy his unlawful refusal to bargain by resuming negotiations upon request of the union. An unpublished study by University of Pittsburgh Professor Philip Ross, on file at the National Labor Relations Board, shows that in the five year period from 1958 to 1962 the Courts of Appeals enforced sixty-eight Labor Board bargaining orders even though, as here, more than four years had elapsed from the time the unfair labor practice complaint was issued until the reviewing court was asked to enforce the Labor Board order.[11]

C. The Decision Below Raises Serious Questions Concerning the Administration of the Labor-Management Relations Act.

The unsupported *ipse dixit* of the court below that fur-

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[9] *N.L.R.B.* v. *Adhesive Products Corp.*, 281 F. 2d 89; *N.L.R.B.* v. *Marcus Trucking*, 286 F. 2d 583; *N.L.R.B.* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713.

[10] *Perry Coal Co.* v. *N.L.R.B.*, 291 F. 2d 126; *International Union, Progressive Mine Workers* v. *N.L.R.B.*, 319 F. 2d 428.

[11] In all these cases the Union was newly certified and the Employer unfair labor practice took place during bargaining over the initial collective agreement. In 21 of these cases, the renewed negotiations resulted in a contract.

ther negotiations would be a "futility" wreaks havoc with the normal processes of collective bargaining, and illustrates why Congress, and this Court, have repeatedly insisted that the knowledgable experts on the Labor Board be given free hand in fashioning remedies. Remedial bargaining orders are not a "futility", as the lower court held, despite the intervening loss of union majority status and the lapse of much time.

Vassar Professor Emily Brown made a study for the Labor Board of the Section 8(a)(5) enforcement orders which had been resisted on the ground that the union no longer represented a majority of the employees. Her results:

> "Contracts were secured as a result of the bargaining ordered by court decrees in 39 of the 46 units involved in the 45 cases studied. Negotiations failed to culminate in contracts in 5 cases. In 2 cases, the bargaining situation was still inconclusive."[12]

The Professor Ross study (on file at the Labor Board) of the results of bargaining orders entered more than four years after the violations shows from 1958 to 1962 this Court affirmed or refused to review twelve orders that bargaining be resumed, and in eight of these twelve cases, the resulting negotiations culminated in a collective agreement. See, e.g., *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 330 (3,302 days from filing of charges to signing of contract); *Southern Bleachery & Print Works Inc.* v. *National Labor Relations Board*, 257 F. 2d 235, *cert. den.* 359 U.S. 911 (1,400 days from filing of charge to signing of contract); and *Kohler Co.* v. *Local 833, UAW-AFL-CIO*, 300 F. 2d 699, *cert. den.* 370 U.S. 911.

The exercise of administrative authority by the Labor Board in this case seems well within the allowable area of the Board's discretion in carrying out congressional policy;

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[12] Brown, *Studies of the Results of NLRB Activities*, U. S. Gov. Printing Office 1946, p. 37.

and the lower court's heavy-handed intrusion into the administrative domain warrants this Court's review.

II

THE DECISIONS BELOW THAT THE EMPLOYER BARGAINED IN GOOD FAITH WHEN IT PRESENTED A NOW-AND-FOREVER FIXED BARGAINING PROPOSAL ON JULY 28, 1960 (FROM WHICH IT REFUSED TO BUDGE) CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND RAISE SERIOUS ISSUES CONCERNING THE ADMINISTRATION OF THE LABOR-MANAGEMENT RELATIONS ACT.

The requirement that an employer bargain in good faith was inserted in the original Wagner Act because "the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored." S. Rep. No. 573, 74th Cong., 1st Sess., p. 12. Since the first, the Labor Board has held that "collective bargaining is something more than mere meeting of an employer with the representative of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable ground." 1 N.L.R.B. Ann. Rep., pp. 85-86. This Court recently agreed that collective bargaining "is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; . . . the parties . . . are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *National Labor Relations Board* v. *Insurance Agents' International Union*, 361 U.S. 477, 485-486. Unilateral determination of wage structures is a "violation of sec. 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of sec. 8(a)(5) much as does a flat refusal" to meet with the opposing party. *National Labor Relations Board* v. *Katz*, 369 U.S. 736 743. Nor can the duty to bargain in good faith be satisfied "by merely meeting with union representatives to inform them that the employer cannot or will not change its

position." *N.L.R.B.* v. *Fitzgerald Mills Corporation,* 313 F. 2d 260, 266 (2d Cir., 1963). There must be a fair opportunity to exchange and discuss proposals and counterproposals. *N.L.R.B.* v. *Yutana Barge Lines, Inc.,* 315 F. 2d 524 (9th Cir., 1963).

The bargaining in this case was a grievous departure from the requirements of this Court and the Courts of Appeals as above described.

The Employer announced a package proposal of economic benefits on July 28 after ten prior negotiation sessions. This package was unrelated to the economic demands of the UAW, and admittedly would have been offered "even if there had been no union." The Employer arrived at this proposal after a study of area rates "in accordance with the Company's practice in prior years" and presumably after negotiations by and between the Employer's officials. But the UAW negotiators were totally unaware of and totally excluded from participation in the considerations which led up to the Employer's final and ultimate determination of the "wages, hours and other terms and conditions of employment" which were to govern. This proposal was announced as "final," as a proposal which was intended to end, not begin, negotiations; and the Employer refused to yield in any respect or to any degree thereafter. Those present on Management's side were not authorized to deviate from the proposal, and those with such authorization refused to be present. The terms and content of the proposal were "frozen" *ab initio,* and the UAW negotiators were "frozen" out of any participation in meaningful negotiations.

The Trial Examiner found that the Employer had refused to bargain in good faith with the UAW on and after this proposal was submitted on July 28, and that this refusal was the cause of the strike which began on September 6. The Labor Board reversed, primarily because "the Respondent's proposal came at the eleventh meeting between the parties." The Court of Appeals affirmed, stress-

ing that "July 28 was the eleventh meeting between the parties," and that the "proposed contract contained a number of improvements over existing benefits."

If this decision stands, an employer can meet the statutory requirements of good faith bargaining merely by sending subordinate officials to sit in the same room with union representatives while other subordinate officials confer in private about "area rates" and the economic increases that should be offered whether or not the employees are represented by a union bargaining agent selected in the formality of an NLRB election.

If this decision stands, there no longer need be an *interchange* of ideas, a *mutual* consideration of the merits, a *joint* assessment of considerations relating to impact on costs, plant efficiency, and the competitive situation. Neither party need lay aside personal feelings, resentment over past wrongs, and subjective judgments. It will suffice to march cyphers (with no authority) into a conference while the important decisions are made off-stage, unilaterally and in secret.

If this decision stands, collective bargaining as it is now known is seriously jeopardized and can be avoided by empty subterfuge by the employer who still resents the idea that his employees are to have a collective voice in the policies that govern their wages, their hours, and the other terms and conditions of their employment.

III

THE DECISIONS BELOW THAT THE UAW FORFEITED REINSTATEMENT RIGHTS OF REPLACED STRIKERS WHEN IT CONTINUED, AFTER IMPASSE, TO SEEK A SOLUTION OF THE SUPER-SENIORITY ISSUE AT THE BARGAINING TABLE, RAISES IMPORTANT QUESTIONS CONCERNING THE ADMINISTRATION OF THE LABOR-MANAGEMENT RELATIONS ACT AND HAS A DELETERIOUS IMPACT ON THE COURSE OF FUTURE BARGAINING PRACTICES.

On September 26, during a strike, the Employer informed the UAW (with copies to all employees) that unless

its offer of July 28 was accepted within four days, the Employer would insist upon a super-seniority provision for all strike replacements.

A super-seniority clause is a non-mandatory subject of bargaining within the meaning of *N.L.R.B.* v. *Wooster Division of Borg-Warner Corporation*, 356 U.S. 342, if it is a lawful bargainable subject at all.[13] In any event, insistence upon a super-seniority clause after union rejection is a refusal to bargain in good faith, *Olin Mathieson Chem. Corp.* v. *N.L.R.B.*, 232 F. 2d 158 (4th Cir. 1956) because "super-seniority by its very terms operates to discriminate between strikers and non-strikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted." *N.L.R.B.* v. *Erie Resistor Corporation*, 373 U.S. 221, 231.

No self-respecting union can cast the interest of its members to the winds by accepting a super-seniority proposal. Employer negotiators know this full well. It could have been no surprise to the Employer when the UAW filed an unfair labor practice charge upon receipt of this proposal. At the first face-to-face meeting on October 7, the parties "were up one side of the ladder and down the other talking" about this subject. Positions were clear and opposed. Had the UAW broken off negotiations at this point, the strike thereafter would have been an unfair labor practice strike (as contrasted with an economic strike) and the strikers would have been entitled to reinstatement upon demand. But the UAW went the last mile in hopes of a

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[13] *N.L.R.B.* v. *National Maritime Union*, 175 F. 2d 686 (2d Cir., 1949) (union proposal for preferential hiring-hall clause unlawful); *N.L.R.B.* v. *Retail Clerk's Int. Assoc.*, 203 F. 2d 165 (9th Cir., 1953) (union proposal that it bargain for supervisory employees unlawful); *International Longshoremen's Ass'n* v. *N.L.R.B.*, 277 F. 2d 681 (D.C. Cir., 1960) (union insistence that Employer bargain for those outside the certified unit unlawful); *N.L.R.B.* v. *Darison*, 318 F. 2d 550 (4th Cir., 1963) (employer insistence upon an indemnity bond unlawful). See also, McManemin, *Subject Matter of Collective Bargaining*, 13 Lab. L.J. 985, 1001 (1962).

peaceful accommodation at the bargaining table. The Employer began hiring strike replacements on October 12, and the UAW met with the Employer on three subsequent occasions—October 29, November 22 and December 28—to urge that the strikers be afforded reinstatement rights. When the Employer refused to accept the UAW surrender terms, the UAW finally broke off negotiations.

The Labor Board and the court below held that the unfair labor practice strike began after the last meeting on December 28. This penalizes the UAW (and the strikers replaced between October 7 and December 28) because of its last ditch resort to the practices and procedures of collective bargaining. The lesson of the decisions below is clear—for self-protection, a union now must abandon negotiations at the first instance of impasse in bargaining.

Such a result is clearly inconsistent with the declared policy of the United States to encourage "the practice and procedure of collective bargaining," 49 Stat. 449, 29 U.S.C. § 151, and warrants this Court's review.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 11, 1964.

APPENDIX A

140 NLRB No. 90 D-5086
Middletown, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 9-CA-2192, 9-CA-2240

The Philip Carey Manufacturing Company (Miami Cabinet Division)

and

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, and its Local Union No. 689

DECISION AND ORDER

On February 21, 1962, Trial Examiner Sidney Sherman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel, the Charging Party, and the Respondent filed exceptions to the Intermediate Report and supporting briefs. The Respondent also filed a motion to expedite and requested oral argument.[1]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified herein.

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[1] The request for oral argument is denied. The record, including the exceptions and briefs, adequately presents the issues and the positions of the parties.

1. The Trial Examiner found that the Respondent had refused to bargain in good faith with the Union on and after July 28, 1960, and that this refusal was the cause of the strike that began on September 6, 1960. We do not agree.

After the Union's certification on May 17, 1960, the parties engaged in extensive bargaining. Meetings began on April 18, and on July 28, at the eleventh meeting, the Respondent, after having considered the Union's proposals and having made counterproposals, made a complete contract proposal which it described as a final offer to end negotiations and its best offer to avoid a strike. The Union found the offer unsatisfactory because, although it provided for a wage increase, it cut back from the Respondent's past practices with respect to accumulation of seniority on layoffs and rates to be paid during temporary transfers to avoid layoff.

From July 28, when this proposal was made, to September 6, when the strike began, there were seven meetings. During this time, although the Respondent did make minor changes in certain respects, it did not alter its proposal in the respects the Union found objectionable.

On September 6, when a strike vote had been taken and the strike deadline set for that night, Ross, the Union's chief negotiator, telephoned Humphrey, Respondent's president, who had not theretofore participated in negotiations, explained the situation, and sought to meet with Humphrey in an effort to avert a strike. Humphrey refused a meeting, saying that, although Ross had mentioned matters of which he was unaware, nevertheless he would adhere to his policy of not becoming involved in plant level negotiations, noting also that he considered Respondent's negotiators qualified.

On substantially these facts, the Trial Examiner found that on and after July 28, the Respondent had refused to bargain in violation of Section 8(a)(5).[2] In so doing, the

[2] In reaching his result herein, the Trial Examiner disavowed any intent to pass generally upon a technique of bargaining which he refers to as "Boulewareism." However, his reference to the Respondent's bargaining as a form of "Boulewareism" creates some ambiguity as to his rationale. As our decision herein makes clear, we are deciding this case only on its own facts, and not passing upon any purportedly general technique of bargaining.

Trial Examiner held that after making its July 28 proposal the Respondent froze its position and became deaf to any arguments the Union might advance. The Trial Examiner also found that this intransigence was compounded by Humphrey's refusal to meet with Ross, especially in the light of the lack of authority of the Respondent's negotiators to make significant changes in the proposal. We disagree.

Assuming that in fact the Respondent made a so-called final offer on July 28, we believe that the Trial Examiner placed too much stress on finality and not enough on the amount of negotiation that preceded the "final" offer. The Respondent's proposal came at the eleventh meeting between the parties, it did offer a wage increase, and it does not appear to us in the circumstances to be an indication of a failure to bargain in good faith.[3] That the Respondent regarded its offer as final is a matter of its own judgment. One need not listen to argument endlessly. There comes a point in any negotiation where the positions of the parties are set and beyond which they will not go. Where that point is obviously depends on all the facts of the case. On the facts of this case we are not prepared to say that the Respondent exceeded the limits of permissible bargaining by substantially adhering to its July 28 proposal.

Nor do we think that Humphrey's refusal to meet with Ross alters the case. The Respondent had entrusted its negotiations to both a corporate officer, Fasold, who specialized in such matters, and to Evans, the plant manager, its highest official on the scene, whose competence is not questioned, and whose authority was certainly as broad as that of Ross. In such circumstances, we cannot attach any significance to the refusal of the Respondent to depart from its customary procedures.

Accordingly, we find that the strike which began on September 6, 1960, was an economic strike in its inception.

2. The Trial Examiner further found that even had the strike not been an unfair labor practice strike from inception, it was converted to one as of December 28 by the Re-

[3] We note, in this connection, that the Union seeks now to have the Respondent sign a contract similar in these respects to the July 28 offer.

spondent's conduct after the strike began. We agree with this finding.

Specifically, the Trial Examiner relied upon the Respondent's insisting, to impasse on December 28, upon its superseniority proposal. That proposal was first made in a letter from Respondent to the Union (copies being sent to the employees) on September 26, 1960. In this letter Respondent informed the Union that unless the contract proposal was accepted by September 30, the proposal would be amended by adding a provision that nonstrikers and replacements for strikers be given special seniority for layoff and recall. The deadline for acceptance was later extended to October 7. It is clear, as the Trial Examiner found, that the Union, which sought the return of all strikers with their seniority intact, took a position strongly opposed to this proposal. The Respondent, on the other hand, insisted upon the inclusion of the superseniority provision in any contract it would sign. This was clear in Fasold's statements of November 23, which remained unchanged to December 28, when meetings broke off. Meetings did not resume until August of 1961 when the Respondent, after the Board issued its decision in *Erie Resistor*, 132 NLRB 621,[4] notified the Union that it was withdrawing the superseniority proposal. While it is true that no agreement was reached thereafter, it is obvious that it was only the removal of this impediment that made further meetings possible. We are therefore, like the Trial Examiner, satisfied that bargaining negotiations between the parties reached an impasse on December 28, 1960, because of the Respondent's unlawful insistence upon the inclusion of its superseniority proposal.[5]

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[4] In *Erie Resistor*, (enforcement denied 303 F. 2d 359 (C. A. 3), certiorari granted October 8, 1962), the Board held that superseniority was an unlawful form of discrimination and that insistence upon it as a condition of negotiating an agreement was therefore violative of Section 8(a)(5).

[5] We are not here passing upon whether in fact the Union could, consistent with its duty as certified bargaining agent, agree to such a proposal. The union did not agree. Moreover, there is no suggestion in the record that the strikers, who struck originally for economic purposes, changed their objective as a result of the September 26 letter.

We also agree that the Respondent's insistence on this proposal contributed materially to the prolongation of the strike on and after December 28, 1960. As the Trial Examiner noted, the issue of reinstatement of all the strikers was of great importance to the Union and the Respondent's proposal was an insuperable obstacle to the achievement of that goal.

3. The complaint alleged, and the Trial Examiner found, that the Respondent had violated Section 8(a)(3) by its failure to reinstate all the strikers for whom the Union unconditionally requested reinstatement in August 1961. His finding in this respect is based upon his prior finding that the strike was an unfair labor practice strike from its inception.[6] We have found, however, that the strike was an economic one until December 28, 1960. Accordingly, the Respondent was free to replace strikers up to that time and was under no obligation to reinstate any strikers who

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As set forth in the text, it was only after the December 28 impasse in collective bargaining that the Respondent's proposal became an insuperable obstacle to settlement of the strike. Hence, for purposes of the instant case, we need not and do not determine in what respect, if any, the letter of September 26 was violative of the Act. Moreover, we specifically disagree with the Trial Examiner's finding that the Respondent's letter of September 26, 1960, was independently violative of Section 8(a)(1) in its statement that strikers who were permanently replaced lost their seniority. The Trial Examiner relied in this connection on his finding, with which we disagree, that the replaced employees were unfair labor practice strikers at this time.

Member Brown considers the publication of the September 26 letter as a threat to institute unlawful superseniority unless striking employees would forego their lawful concerted action. Such threat clearly violated Section 8(a)(1) in Member Brown's opinion, and he would further find that the strike was converted to an unfair labor practice strike on September 26.

[6] At one point in his Intermediate Report, the Trial Examiner states that the strike was still current at the time of the hearing. The Respondent urges this fact as a bar to any backpay award. We do not agree. Even assuming that the strike was then in effect—a point not entirely clear on this record—it is still evident that the strikers had made unconditional applications to return to work, and any continuation of the strike thereafter was attributable to the denial of the request. Cf. *Hawaii Meat Company, Limited*, 139 NLRB No. 75; *Marathon-Clark Cooperative Dairy Association*, 137 NLRB No. 91.

had been replaced before December 28. Accordingly, contrary to the Trial Examiner, we do not order the reinstatement of strikers replaced before December 28, 1960.[7]

4. The Trial Examiner dismissed the allegation of the complaint based upon the Respondent's alleged effectuation of its superseniority proposal.[8] Both the General Counsel and the Union except to this.

The Trial Examiner's finding is based largely on his resolution of factual issues, and his reliance upon the distinction between superseniority as a contract proposal and an operating procedure. As noted above, the Trial Examiner did find insistence upon the proposal. He did not find implementation.

The Trial Examiner relied on the testimony of Hays, one of Respondent's attorneys, that he had misinterpreted Respondent's proposal when, during the investigation of this case, he wrote the Board stating that the Respondent's superseniority proposals had been put into effect. The Trial Examiner, in the light of this finding, similarly attributed alleged statements of Fasold and Evans to their failure to observe the distinction between superseniority as a proposal and superseniority as a procedure. Especially as there is no concrete evidence establishing that superseniority was put into effect, while there is evidence that no mention was made of superseniority to those replacements who were hired, we agree with the Trial Examiner.

5. The Trial Examiner found no violation in respect to the Respondent's refusal to reinstate strikers David Back, Ross Dalton, William Napier, Jimmie Combs, James Pra-

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[7] In appendix B to the Intermediate Report, the Trial Examiner set forth the names of all strikers he found entitled to reinstatement. The Appendix hereto lists the names of all those strikers who we find, on the basis of the evidence adduced, had not been replaced before December 28, and who are entitled to reinstatement.

[8] The Trial Examiner dealt with this issue on the merits despite his reservations as to whether there was not a variance between complaint and charge in this respect beyond what would be permitted under the doctrine of *N.L.R.B.* v. *Fant Milling*, 360 U.S. 301. In view of our agreement with the Trial Examiner as to disposition of this issue, we do not deem it necessary to pass upon the applicability of *Fant*.

ter, and Stanley Harris, because of their alleged misconduct during the strike. As it appears that this misconduct, and the replacement of these individuals occurred, except in the case of Harris, before the strike became an unfair labor practice strike, there was, in any event, no obligation to reinstate those who had been replaced. We therefore affirm the Trial Examiner's dismissal with respect to these strikers without passing upon whether their misconduct was in fact sufficient to warrant a refusal to reinstate.[9] As to Harris, however, even though not replaced, we find in agreement with Trial Examiner that his misconduct warranted the Respondent's denial of reinstatement.

The Remedy

We have found that the Respondent discriminatorily denied reinstatement to the employees listed in the Appendix on the ground that they had been replaced after the strike had been converted, on December 28, to an unfair labor practice strike. We shall therefore order that the Respondent offer these employees reinstatement to their former or substantially equivalent employment without loss of seniority or other rights and privileges, discharging if necessary any replacements hired on or after December 28, 1960, the date on which, as we have found, the strike became an unfair labor practice strike. The Respondent shall make these employees whole for any loss of earnings they may have suffered by reason of the Respondent's discrimination against them by payment to each of them of a sum of money equal to the amount he normally would have earned as wages from the date of his unconditional application for reinstatement (set forth opposite his name in the Appendix) to the date of the Respondent's offer of reinstatement less his net earnings (*F. W. Woolworth*, 90 NLRB 289). Backpay shall include payment of interest at 6 per-

[9] The Trial Examiner granted the General Counsel's motion to strike from the complaint the names of four other strikers alleged to have engaged in strike misconduct. The Union excepts to this ruling. We affirm the Trial Examiner's ruling. Cf. *Amalgamated Lithographers*, 137 NLRB No. 180.

cent per annum in accordance with the Board's usual practice.[10]

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner, but the Appendix attached hereto shall be substituteed for Appendix B to the Intermediate Report, and the names in the Appendix shall be substituted for those in the Notice.[11]

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman,
PHILIP RAY RODGERS, Member,
BOYD LEEDOM, Member,
JOHN H. FANNING, Member,
GERALD A. BROWN, Member,
National Labor Relations Board.

(SEAL)

NOTE: We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

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[10] *Isis Plumbing & Heating Co.*, 138 NLRB No. 97. For the reasons set forth in the dissenting opinion in *Isis*, Members Rodgers and Leedom would not award interest.

[11] The notice appended to the Intermediate Report is hereby amended by deleting the clause "This Notice must remain posted for 60 days from the date hereof" and substituting therefor "This notice must remain posted for 60 consecutive days from the date of posting."

APPENDIX B

Nos. 15289-15330

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

The Philip Carey Manufacturing Company, Miami Cabinet Division, Petitioner,

v.

National Labor Relations Board, Respondent.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO, and Its Local Union No. 689, Petitioners,

v.

National Labor Relations Board, Respondent.

On Petitions to Review and Set Aside Portions of an Order of the National Labor Relations Board and Cross-Petition of the Board for Enforcement.

Decided March 31, 1964.

Before: O'Sullivan, Acting Chief Judge, Phillips, Circuit Judge, and Magruder, Senior Circuit Judge.*

PHILLIPS, Circuit Judge. This is a vigorously contested labor case, involving a number of issues.

The parties are the Philip Carey Manufacturing Company, hereinafter called the Company, and the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO, and its local union No. 689, hereinafter referred to as the Union. The case is before this Court on petitions for review filed by both the Company and the charging Union, and on the cross-petition of the National Labor Relations Board for enforcement

* Senior Circuit Judge, First Circuit, sitting by designation.

of its order. The decision and order of the Board are reported at 140 N.L.R.B. No. 90.

The circumstances giving rise to this controversy, in summary, are as follows: Early in 1960 the Union began its campaign to organize the Company's Middletown, Ohio, plant. An election was held on March 9 resulting in 122 votes for the Union, 106 votes for Miami Cabinet Independent Union, and six votes for no union. On March 17 the Union was duly certified.

Negotiations for a contract began on April 18, 1960. The Union submitted a proposed contract on May 16 and agreement was reached eventually on a number of issues, including grievance and arbitration procedures. On July 28 the parties met for the eleventh time, and the Company submitted a proposed complete contract. This proposal incorporated all provisions agreed upon at the ten previous negotiation meetings and contained a number of improvements over existing benefits. The estimated total value of the general increase and monetary fringe benefits was nine cents per hour apart from incidental pay increases resulting from abolition of rate ranges. The Board found the Company offer of July 28 to be an economic package slightly greater than that offered by the Company in any of its other organized plants.[1]

The Union rejected the Company's offer because it revised past practices with respect to accumulation of seniority during lay offs and rates to be paid during temporary transfers to avoid lay off.[2]

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[1] The Company operates eight plants in the United States and two in Canada. All but one of these are organized.

[2] There is a marked disagreement as to the effect of these two disputed proposals. In its brief the Union says that the Company "withdrew benefits which the employees had enjoyed for as long as any witness could remember" and charges that the Company's "stubborn, bigoted adherence to its position . . . reveals its initial ulterior purpose." The Trial Examiner found that part of the transfer proposal "represented a potential net gain to the employees," under which some transferred employees would be "worse off" and some "better off" and that the proposal concerning accumulation of seniority during lay off would benefit employees laid off for more than six months and be less favorable for employees laid off for less than six months.

Between July 28, when the Company's proposal was made, and September 6, the parties had eleven more meetings. On September 6 the employees voted to go out on strike, and the strike began at midnight.

On September 26 the Company wrote a letter to the Union renewing its proposal, with the exception of a check-off provision, and stating that if the offer was not accepted by September 30, the Company would modify its seniority proposal so as to give "special seniority rights" for lay off and recall purposes to nonstrikers and to employees replacing strikers. The Company also stated in this letter that it would be necessary to commence the hiring of permanent replacements, but that strikers who reported for work by October 3 would be reemployed. Copies of this letter were sent to all employees. By "special seniority," the Company meant that, for layoff and recall purposes only, the seniority of any employee would accrue from the first day he worked after the strike began.[3]

The parties met on September 29, but without affirmative result. They met again on October 7, and the Company presented its written proposal for "special seniority" and said that, absent agreement, this would become a part of its contract offer.

The Company began hiring replacements on October 12. After meeting on October 29 the parties next met on November 22, when the Union presented some new proposals. This meeting continued the following day, November 23 and there is conflicting testimony as to exactly what occurred. From a synthesis of the testimony, the Trial Examiner found that the two significant issues had become the Company's insistence on its superseniority[4] proposal and the Union's insistence on reinstatement of all strikers.

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[3] Thus a nonstriker, returning striker, or newly hired employee who worked on October 15, for example, would have greater seniority for lay off or recall than an unreplaced striker who did not return to work until October 16. Therefore the proposal would have deprived returning unreplaced strikers of all their accumulated seniority for purposes of lay off and recall.

[4] The Company refers to this proposal as "special seniority" and the Union and the Board describe it as "superseniority." In this case the two terms have the same meaning.

The parties next met on December 28, when the Union said that it could not recognize the replacements in the plant. The Company contends that the issue of superseniority was not discussed at this meeting, though a union representative testified that there was no change in the Company's position on superseniority. After this meeting the parties recessed, subject to further call by the Mediation Service. There were no further meetings until August 23, 1961.

Meanwhile, the Company continued its restaffing program, which was virtually completed by February 1, 1961.

On August 3, 1961, the Union sent the Company, on behalf of 122 named strikers, unconditional offers to return to work. The Company replied, on August 9, 1961, that fifteen of the named employees had been rehired, that ten of the strikers had been denied reinstatement because of strike misconduct, and that the rest had been denied reinstatement because they had been permanently replaced.

On August 10, 1961, the Company wrote to the Union that it was withdrawing its superseniority proposal. This letter came on the heels of the Board's decision in Erie Resistor Corp., 132 N.L.R.B. 621, the import of which will be discussed hereinafter.

The Union construed this letter to mean that the Company was also withdrawing from its position that replaced strikers had no reinstatement rights. The Union wired the Company that it interpreted this letter to mean that the Company would rehire all the strikers who had applied for reinstatement, and give notification that they would report for work on August 14. The Union also suggested a meeting on August 14, stating that "numerous problems are posed." This was the Union's first request for a meeting since December 28, 1960.

The Company promptly replied to the Union by wire, stating unequivocally that all strikers not yet rehired had been permanently replaced.

The parties met on August 23, 1961, and the Company explained that its letter of August 10 had meant only to withdraw the superseniority proposal, and nothing more.

The last meeting was held September 7, 1961. The Company offered a proposed contract at this meeting which

embodied the July 28, 1960, proposal with two changes, and with the superseniority proposal omitted. The Union said that it could not accept the contract without reinstatement of the strikers. There were no further meetings.

The following questions are presented:

(a) Was the strike an economic strike or an unfair labor practice strike at its inception? The Board held it to be an economic strike.

(b) Did the Company put into effect a program of superseniority in violation of §§ 8(a)(1) and 8(a)(3) of the Act, 29 U.S.C. § 158(a)(1) and (a)(3)? The Board answered in the negative.

(c) Did the Company insist upon a contractual provision for superseniority to the point of impasse in violation of § 8(a)(5), 29 U.S.C. § 158(a)(5) and, if so, as of what date? The Board answered in the affirmative, as of December 28, 1960.

(d) Did the insistence of the Company upon superseniority convert the strike into an unfair labor practice strike, and, if so, as of what date? The Board answered in the affirmative, as of December 28, 1960.

(e) Were twenty-eight unfair labor practice strikers entitled to reinstatement and back pay? The Board answered in the affirmative.

(f) Should interest be allowed on the back pay awards? The Board answered in the affirmative.

(g) Were the charges of unfair labor practiecs in question barred by the six-month limitation provisions of Section 10(b) of the Act, 29 U.S.C. § 160(b)? The Board answered in the negative.

(h) Did certain statements made by four supervisory personnel constitute coercive attempts on the part of the Company to induce employees to abandon the strike, in violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1)? The Board answered in the affirmative.

(i) Did the Trial Examiner properly exercise his discretion when he granted the General Counsel's motion to strike the names of four strikers from the amended complaint on the ground that they had engaged in misconduct which barred their reinstatement? The Board answered in the affirmative.

(j) Should the Company be required to continue to bargain with the Union under the circumstances of this case and despite the Union's loss of majority? The Board answered in the affirmative.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their statutory rights. Affirmatively the Board ordered the Company upon request to bargain with the Union in good faith; offer reinstatement to those reapplying strikers who were not replaced before December 28, 1960 and reimburse them for any loss of pay they may have suffered by reason of the discrimination against them; plus interest; and to post the customary notices. The Company contends that the Board's findings of unfair labor practices against it are unwarranted and that the order should not be reenforced. The Union asserts that various findings are erroneous and that the Board should have found additional violations and should have directed reinstatement of all replaced strikers.

We grant enforcement in pàr and deny enforcement in part.

(a) The Trial Examiner found that the Company's proposed contract of July 28 constituted an ultimate offer, and thereafter created a bargaining vacuum; that this constituted a refusal to bargain in good faith in violation of Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), which contributed to the strike of September 6; and that the strike was therefore an unfair labor practice strike from the beginning.

With these findings the Board disagreed. It tressed the fact that the July 28 offer came at the eleventh meeting of the parties, and observed that "there comes a point in any negotiation where the positions of the parties are set and beyond which they will not go." The Board concluded that the Company continued to bargain in good faith after the July 28 offer, and therefore the strike was an economic strike at its inception. The Union would have this Court find, as did the Trial Examiner, that the proposed contract

submitted by the Company on July 28, 1960, constituted an ultimatum, created a bargaining vacuum, and rendered ensuing negotiations bad faith bargaining, thereby contributing to the strike of September 6, 1960.

We find that the holding of the Board on this question is supported by substantial evidence on the record and that the holding of the Trial Examiner was erroneous. As the Board pointed out, July 28 was the eleventh meeting between the parties and the Company was entitled to take a definite position at that time. The proposed contract contained a number of improvements over existing benefits and was the biggest economic package offered by the Company at any of its seven other plants in the United States, as set forth above in more detail. Furthermore, there were eleven more meetings between July 28 and the date of the strike.

We therefore approve the holding of the Board that the Company did not exceed the limits of permissible bargaining by adhering substantially to its July 28 proposal and that the Company continued to bargain in good faith from July 28 to the time of the strike on September 6. From this conclusion it necessarily follows, as found by the Board, that the strike was an economic strike in its inception.

It is established law that if an employee is replaced while on an economic strike, he is not entitled to reinstatement as a matter of right. So long as the strike retained the status of an economic strike, the Company had a right to employ replacements and was not required to reinstate replaced striking employees upon their election to return to work. N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333.

(b) The Union contends that the Company put into effect a system of superseniority during the strike and that the Company thereby violated Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), relying upon N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, and Swarco, Inc. v. N.L.R.B., 303 F. 2d 668 (C.A. 6). Both the Trial Examiner and the Board found that superseniority was never placed in effect. While the testimony is conflicting on this point, we find substantial evidence on the record to support this holding of the Board. The record shows that company representa-

tives denied that superseniority was put into effect; there were no changes in the Company's seniority lists; in interviewing replacements the Company did not discuss superseniority and gave no assurance of superseniority to job applicants; and no Company advertisements for job applicants during the strike made any reference to superseniority. In finding that the Company never put superseniority into effect, the Board performed its function "to reconcile the conflicting testimony and to determine the credit or weight to be attached to the testimony of the various witnesses." N.L.R.B. v. Sawyer Downtown Motors, 213 F. 2d 514, 515 (C.A. 7); N.L.R.B. v. Aurora City Lines, Inc., 299 F. 2d 229, 232 (C.A. 7). Therefore, the Board's findings on this issue, which are supported by substantial evidence, will not be disturbed. Old King Cole v. N.L.R.B., 250 F. 2d 791, 792 (C.A. 6); Raser Tanning Co. v. N.L.R.B., 276 F. 2d 80, 84 (C.A. 6), cert. denied, 363 U.S. 830.

(c) We now come to the most difficult question in the case, and one which will be determinative of some of the other issues. This is the question of the Company's superseniority proposal and its effect upon the strike. The Board, as set out above, found that the Company's insistence on this proposal converted the strike into an unfair labor practice strike on December 28. The Union argues that insistence on superseniority converted the strike prior to this time, and the Company contends that the strike was never converted from its status as an economic strike.

Before turning to the question of the conversion of the strike, there should be some consideration of the legal significance of superseniority. The company contends that the fact that superseniority was never placed in effect serves to distinguish this case from N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221; Swarco, Inc. v. N.L.R.B., 303 F.2d 668 (C.A. 6); and Griffin Pipe Division of Griffin Wheel Co. v. N.L.R.B., 320 F. 2d 656 (C.A. 7). In those cases superseniority plans were found to be unlawful, but in each case the plan had been put into effect.

This does not mean, however, that superseniority must be put into effect in order to be unlawful. A careful delineation must be made of the issue here involved. The three above-cited cases stand for two separate propositions.

To grant superseniority to replacements and returning strikers is discrimination in violation of § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3). N.L.R.B. v. Erie Resistor Corp., supra; Swarco, Inc. v. N.L.R.B., supra. To insist on a superseniority provision in the contract may constitute a refusal to bargain in violation of § 8(a)(5), 29 U.S.C. § 158(a)(5). N.L.R.B. v. Erie Resistor Corp., supra; Griffin Pipe Division of Griffin Wheel Co. v. N.L.R.B., supra. It is important that the distinction between the effects of enforcing and insisting upon superseniority be made clear. Thus, in the instant case, the Company never put into effect a superseniority plan and therefore did not, in this respect, violate § 8(a)(3). The question remains whether the Company so insisted on superseniority to a point of impasse that it constituted a refusal to bargain in violation of § 8(a)(5).

Before proceeding to the case at hand, some consideration should be given to the meaning of the word "insistence" in this context. The Union, apparently in the hope that insistence will be equated with mere advocacy, refers to the following quotation: "If the proposal is not a mandatory bargaining subject, insistence upon it was a per se violation of the duty to bargain." Industrial Union of Marine & Shipbuilding Workers v. N.L.R.B., 320 F. 2d 615, 618 (C.A. 3), citing N.L.R.B. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, and N.L.R.B. v. Davison, 318 F. 2d 550 (C.A. 4). All of these cases use merely the word "insistence"; other cases would indicate that insistence, in this context, means insistence to the point of impasse. In International Longshoremen's Ass'n. v. N.L.R.B., 277 F. 2d 681, 683 (C.A. D.C.), it was said: "The union had a right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it did not posit the matter *as an ultimatum.*" (Emphasis added.)

In the Erie Resistor case the Board said: "Respondent's continued insistence on this or a similar proposal, *as a condition of negotiating an agreement* with the Union, consituted a violation of § 8(a)(5)." 132 N.L.R.B. at 631. (Emphasis added.) Finally, the Trial Examiner in the instant case said: "While the meaning of 'insist' as used in

this context has not been precisely defined, it would seem to connote, at the very least, persisting in a proposal to the point of impasse, notwithstanding objection thereto by the other party to the bargaining"

Now, with this background in mind, we turn to the case at hand to determine whether, and at what point, the Company insisted on superseniority to a point of impasse.

The Company's superseniority proposal was first made in its letter of September 26. The Board found that the Company insisted on the inclusion of this provision in any contract it might sign, and that this insistence caused the bargaining negotiations to reach an impasse on December 28. The Board noted that after that date there were no further meetings until the Company withdrew its superseniority proposal. The Board concluded that the Company's insistence on its proposal contributed materially to the prolongation of the strike after December 28, and that on that date the strike was converted from an economic strike to an unfair labor practice strike.

Here it might be noted that Board Member Brown was of the opinion that the letter of September 26 constituted a threat to institute superseniority in violation of § 8(a)(1), 29 U.S.C. §158(a)(1), and that on this date the strike was converted to an unfair labor practice strike.

The Union contends that the strike was an unfair labor practice strike from its inception on September 6, but, in the alternative, that it was converted into an unfair labor practice strike well before December 28. There are several dates which the Union asserts as earlier alternatives to December 28.

There can be no doubt that the Union opposed vigorously the superseniority proposal and that immediately became a major obstacle in negotiations.

The Union urges that this Court adopt the view of Board Member Brown to the effect that the Company's letter of September 26, which said that the Company would make superseniority a part of its proposed contract, constituted a violation of § 8(a)(1), in that it threatened to institute superseniority and thereby coerced the strikers; and that therefore the strike was converted into an unfair labor practice strike on that date. The Board held that this letter did

not convert the strike, and thus it was not necessary to decide whether the letter constituted an independent violation of § 8(a)(1).

The letter of September 26 said simply that, unless agreement was reached, the Company would make superseniority *a part of its proposed contract.* This did not mean necessarily that the Company was putting superseniority into effect, in violation of § 8(a)(3), and we find that this letter, in and of itself, did not cause the negotiations to reach an impasse, in violation of § 8(a)(5).

The Union next contends that the strike was converted into an unfair labor practice strike as of October 7. At a meeting of the parties on that date the Company presented its written superseniority proposal and made it a part of its proposed contract. The Union says that by making superseniority a part of its proposal the Company insisted upon it to a point of impasse in violation of § 8(a)(5).

Neither the Examiner nor the Board found that bargaining reached an impasse on October 7. There were further meetings in October and November, which tend to weigh against the contention that bargaining had reached an impasse at that time.

The Union next argues in the alternative that the Company insisted upon superseniority to the point of impasse at a meeting held October 19. The Trial Examiner and Board ruled to the contrary, and we find that this holding is supported by substantial evidence on the record.

The next important meeting, for our purposes, was held November 22-23. The Trial Examiner found that at this meeting disagreement was centered on two issues: the Company's superseniority proposal, and the Union's insistence that all strikers be reinstated; and that the other issues had become less significant.

Both the Examiner and the Board passed over the November meeting, and concluded that the Company's insistence on superseniority caused an impasse (and thus converted the strike into an unfair labor practice strike) at the next meeting, held on December 28.

The Company contends that it never insisted upon superseniority to the point of impasse, arguing that even if it

had withdrawn its superseniority proposal at the November or December meetings, the Union's insistence upon reinstatement of all strikers would have remained a major obstacle to agreement. It is well established, however, that in order to reach an impasse in violation of Section 8(a)(5) it is not necessary that Company's proposal be the sole cause for failure of agreement. N.L.R.B. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342; Industrial Union of Marine & Shipbuilding Workers v. N.L.R.B., 320 F. 2d 615, 618 (C.A. 3).

In support of its argument that the superseniority proposal did not prolong the strike, the Company points out that no agreement was reached when it withdrew its superseniority proposal in August 1961. We agree with the holding of the Trial Examiner and the Board that this argument is not conclusive in view of the change in situation as between November and December 1960, when only about one-third of the strikers had been replaced, and August 1961 when all the strikers had been replaced.

We find substantial evidence on the record to the effect that the Company's representative took the adamant position at the meeting of November 23 that the Company would not sign a contract without superseniority, and that this position had not changed at the time of the next meeting on December 28.

As said by the Supreme Court in N.L.R.B. v. Erie Resistor Corp., supra: "[S]uperseniority by its very terms operates to discriminate between strikers and non-strikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted." 373 U.S. at 231.

The holding of the Board that the Company did, in fact, insist upon superseniority to the point of impasse in violation of § 8(a)(5), 29 U.S.C. § 158(a)(5), is well supported by substantial evidence. The evidence might well be held to support a holding that the point of impasse was reached either on November 23 or December 28. In some respects the proof points more strongly to the former date, but, considering the record as a whole, we do not disturb the finding of the Trial Examiner and the Board that the point of impasse was reached on December 28.

The choice of the later date over the former is supported by the very fact that another meeting was held in December, and the fact that on November 23 the Union made some new proposals, thereby indicating that it did not consider the negotiations to be at an impasse at that time, whereas no further meetings were held after December 28 until the Company had withdrawn its superseniority proposal approximately eight months later in August 1961.

The burden was on the Company to show that the strike would have continued even if it had withdrawn its proposal of superseniority. N.L.R.B. v. Wooster Division of Borg-Warner Corp., 236 F.2d 898, 907 (C.A. 6), reversed in other respects, 356 U.S. 342.

(d) Accordingly we approve the holding of the Board that the strike was converted into an unfair labor practice strike as of December 28, 1960.

(e) The Board directed that the Company offer to twenty-eight employees who were replaced after the strike had been converted into an unfair labor practice strike on December 28, 1960, reinstatement to their former or substantially equivalent employment without loss of seniority or other rights and privileges, discharging if necessary any replacements hired on or after December 28, 1960; and that the Company make these employees whole for any loss of earnings they may have suffered by reason of discrimination against them, from the date of their unconditional application for reinstatement to the date of the Company's offer of reinstatement, less net earnings.

The Company was obligated to reinstate unfair labor practice striking employees upon their unconditional offers to return to work. Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 278; N.L.R.B. v. Deena Artware, Inc., 198 F.2d 645, 651-652 (C.A. 6), cert. denied, 345 U.S. 906; Webb Fuel Co. v. N.L.R.B., 308 F.2d 936, 937 (C.A. 6).

We grant enforcement of this part of the order of the Board.

(f) The next question is whether the Board's direction that the Company pay interest at six per cent upon the awards of back pay is a valid exercise of the powers of the Board.

The statute [5] contains no express provision authorizing the Board to allow interest on back pay awards. For twenty-six years the Board adhered to a policy of not allowing interest on such awards. In 1962 this policy was changed by a three-to-two decision so as to allow interest. Isis Plumbing & Heating Co., 138 N.L.R.B. 716.

It is well established that the omission of a mention of interest in statutes which create obligations does not show necessarily a Congressional intent to deny interest. As said by the Supreme Court in Rodgers v. United States, 332 U.S. 371, 373:

> "[T]he failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. Billings v. United States, 232 U.S. 261, 284-288. For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court. See, e.g., Royal Indemnity Co. v. United States, supra; Board of Comm'rs v. United States, 308 U.S. 343.
>
> "As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these

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[5] Section 10(c) of the Act, 29 U.S.C. § 160(c) provides in part as follows:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the subchapter."

> relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained. See, e.g., Brooklyn Savings Bank v. O'Neil, supra; United States v. North Carolina, 136 U.S. 211, 216; Funkhouser v. J. B. Presto Co., 290 U.S. 163, 168."

For example, interest awards were held proper, even though interest was not mentioned in the applicable statutes, where a veteran brought suit for loss of compensation suffered as a result of wrongful refusal to reemploy him under the Universal Military Training and Service Act, 50 U.S.C. App. § 459, Travis v. Schwartz Manufacturing Co., 216 F.2d 448 (C.A. 7); and where a suit was brought on behalf of employees under the Walsh-Healey Act, 41 U.S.C. § 36, to recover underpayments by contractors. Mitchell v. Riegel Textile, Inc., 259 F.2d 954 (C.A.D.C.).

In United States v. United Drill & Tool Corp., 183 F.2d 998, 999 (C.A.D.C.) the court said:

> "Statutory obligations may bear interest even though the statute makes no provision for it. Interest on such obligations is or is not payable depending upon the purpose of the statutory enactment and upon principles of equity. If the obligation is in the nature of a debt it is deemed interest-bearing, because the statutory purpose was to create a debtor-creditor relationship and in equity interest is allowed as a means of compensating a creditor for loss of use of his money."

It is recognized under our legal system that wage-earners are heavily dependent upon wages, which more often than not constitute the sole resource to purchase the necessities of life from day to day. For example, many states have enacted statutes regulating the time of payment of wages, 31 Am. Jur. Labor § 827, p. 995 et seq. The National Bankruptcy Act accords priority to wage claims. 11 U.S.C. § 104

(a)(2). Many wage-earners who are deprived of their wages doubtlessly find it necessary to borrow money to sustain themselves and their families, paying rates of interest at six per cent or higher.

A back pay award creates a debtor-creditor relationship. Reserve Supply Corporation v. N.L.R.B., 317 F. 2d 785, 789 (C.A. 2); cf. Nathanson v. N.L.R.B., 344 U.S. 25.

It is true that the purpose of the Labor Act is remedial and not punitive. Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 10. The contention that an award of interest is violative of these principles was answered as follows in N.L.R.B. v. Globe Products Corp., 322 F.2d 694, 697 (C.A. 4):

> "Underlying the long-accepted practice of awarding interest in debtor-Creditor cases is the principle that to do so fully compensates the creditor for the loss of the use of his money. Under the Act, an award of back pay is treated as a debt, Nathanson v. N.L.R.B., 344 U.S. 25, 27-28, 73 S. Ct. 80, 97 L. Ed. 23 (1952), and where there has been delay it does not appear arbitrary for the Board to include interest. Such an allowance, which merely makes the employee whole, is in no sense punitive as against the employer."

When the Board issues a back pay order, it enforces public and not private rights. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 265, 269.

Under its broad discretionary powers "to take such affirmative action including reinstatement of employees with or without back pay" as will effectuate the purposes of the Act, the Board is authorized no effect "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination," Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 194, and may make a substantial departure from its previous method of computing back pay, N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344. We accordingly join the other Circuits which have passed upon this question in holding that the Board has the discretionary power to allow interest on back pay awards, which was exercised validly in this case. N.L.R.B. v. Central Illinois Public Service Company, . . . F. 2d . . . (C.A.

7); Revere Copper and Brass, Inc. v. N.L.R.B., 324 F. 2d 132 (C.A. 7); Marshfield Steel Co. v. N.L.R.B., 324 F. 2d 333 (C.A. 8); N.L.R.B. v. Globe Products Corp., 322 F. 2d 694, 696-97 (C.A. 4); supra; International Brotherhood of Operative Potters, AFL-CIO v. N.L.R.B., 320 F. 2d 757 (C.A.D.C.); Reserve Supply Corp. v. N.L.R.B., 317 F. 2d 785, 789 (C.A. 2), supra.

Enforcement is granted as to this part of the order of the Board.

(g) The Company argues at some length that the order of the Board directing continued recognition of the Union and reinstatement of strikers is barred by the limitation in § 10(b) of the Act, 29 U.S.C. § 160(b), which provides in pertinent part, "[T]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Here the § 8(a)(5) violation, bargaining to an impasse, occurred on December 28, 1960. The first charge in this case was filed September 23, 1960; an amended charge was filed October 20; and a new charge filed December 7. On July 28, 1961, these were consolidated and a complaint issued. On September 12, 1961, an amended charge was filed, and on October 3, 1961, a motion was filed to amend the complaint. These latter three came more than six months after December 28, 1960, the date of the § 8(a)(5) violation.

Thus the question is presented whether the charge of September 23, 1960, is effective to include the subsequent violation on December 28. Both the Company and the Board agree that the controlling case on this point is N.L.R.B. v. Fant Milling Co., 360 U.S. 301. In that case a charge was filed in May 1954. In October the Company granted an unlawful unilateral wage increase. In January the Board proceeded with the May charge and considered the violation which occurred in October. The Supreme Court upheld the action of the Board, ruling that the Board in formulating a complaint and finding a violation of the Act can take cognizance of events occurring subsequent to the filing of the charge upon which the complaint is based, when such subsequent events are related to the conduct

alleged in the charge and grow out of such conduct while the proceeding is pending before the Board.

The Company contends that in the instant case the violation is not related to the prior charge; that it bargained in good faith up to December 28, according to the findings of the Board; and that the cause of action, if any, arose on that date.

We hold that the tenor of the opinion of the Supreme Court in N.L.R.B. v. Fant Milling Co., 360 U.S. 301, supra, calls for the same result in this case. The Court said: "A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry, N.L.R.B. v. Indiana & M. Electric Co., 318 U.S. 9, 18, 87 L. Ed. 579, 586, 63 S. Ct. 394. The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act." 360 U.S. at 307. Although the Court went on to warn that this was not to imply that the Board is to be left "carte blanche to expand the charge as they might please, or to ignore it altogether," the opinion accords a degree of latitude in this respect, to the end that the Board may administer the Act effectively.

Further relying upon § 10(b), the Company asserts that on September 12, 1961, a charge was filed alleging that the Company refused, in August, to reinstate certain strikers. The Company relies on Greenville Cotton Oil Co., 92 N.L.R.B. 1033, enf., 197 F. 2d 326 (C.A. 5), which held that § 10(b) precludes the Board from finding that a company has violated § 8(a)(3) by refusing to reinstate unfair labor practice strikers, if the unfair labor practice which caused the strike occurred more than six months prior to the charge. This case would seem to be authority for the Company's contention. The Trial Examiner, in the instant case, attempted to distinguish Greenville Cotton on the basis that there no charge had been filed with respect to the

unfair labor practices which caused the strike. In a subsequent case, which reached a contrary result from Greenville Cotton, the Court attempted to distinguish the earlier case, but then said that in any event the Board's decision in Greenville Cotton reaches an illogical conclusion. N.L.R.B. v. Brown & Root, Inc., 203 F. 2d 139, 146 (C.A. 8). The Court reasoned that the charge was not based upon failure to bargain, but upon the Company's refusal to reinstate strikers whose status was such as to entitle them to reinstatement. Applying this reasoning to the case at bar, the refusal to reinstate occurred in August, and the charge so alleging was filed in September and therefore was timely. We hold that this is the more logical approach.

Related to the same point, the Company argues, somewhat alternatively, that it notified the Union on February 8, 1961, of the names of employees who had been permanently replaced, and that the alleged violation of § 8(a)(3) occurred at this time, and the charge filed September 12 was more than six months later and therefore not timely. We agree with the Trial Examiner in his disposition of this question" "[T]he violation alleged is not replacement of the strikers, which is not in itself unlawful, but the refusal to reinstate them upon application, which did not occur until August 1961."

We accordingly hold that the six-month limitation prescribed by the statute does not bar the charges upon which the order of the Board in this case is based.

(h) We now come to the alleged § 8(a)(1) violations. Both the Examiner and the Board found that certain minor supervisory employees made statements coercive in nature. We take up each supervisor in turn.

Earl Goforth: employee Lairson testified that Goforth asked him to come back to work because Goforth understood that if enough strikers returned to work, along with the replacements hired thus far, the Company would put into effect the contract offered the Union.

The Company correctly points out that an employer is free to communicate with and solicit economic strikers, so long as there is no threat or promise of benefit. N.L.R.B. v. Bradley Washfountain Co., 192 F. 2d 144, 153 (C.A. 7);

N.L.R.B. v. Wooster Div. of Borg-Warner Corp., 236 F. 2d 898, 905 (C.A. 6). The Board says, however, that this statement by Goforth went beyond permissible limits, citing N.L.R.B. v. Wooster Div. of Borg-Warner, supra. In that case there was a clear promise of benefit. Here the statement by Goforth seems relatively harmless, and quite obviously was no more than the expression of a personal opinion.

Kenneth Page: employee Lairson said that Page told him "You won't get nothing out of it [the Union]." Page testified that Lairson had originated the conversation and that he (Page) had only said "in my opinion we should lose more than we would gain."

Richard Schneider: employee Smith testified that Schneider told him "he was just afraid that the Company might move to Indiana or someplace where labor was cheaper." Schneider denied making this statement, but the Trial Examiner credited Smith.

Elmer Gibson: when asked by employee Underwood how the Company felt, Gibson said "he did not expect this company to give us a contract," and expressed the opinion that the Company would try to "drag it out."

As regards Schneider and Gibson, the Trial Examiner acknowledged that their statements were "couched in terms of an expression of personal opinion." This, argues the Company, should have settled the matter, since expressions of opinion are allowable. It has been said that "a prediction not coupled with a threat to use the employer's economic power to make the prediction a reality" is permissible. N.L.R.B. v. Rockwell Mfg. Co., 271 F. 2d 109, 118 (C.A. 3). Here none of these minor supervisors was in a position to make his opinion a reality.

Furthermore, the opinions expressed by all four of these minor supervisory employees proved to be erroneous. The Company did not put into effect for the benefit of returning strikers and replacements the contract that had been offered to the Union. Although many of the strikers "got nothing out of the strike," they were offered a contract containing substantial improvements over existing benefits which exceeded the benefits provided at the Company's other plants

in the United States. No officer of the Company at the policy making level is shown to have threatened to move the plant to another location. Rather than "dragging it out" the Company bargained in good faith during at least twenty-seven meetings.

The Board cites N.L.R.B. v. Kingsford, 313 F. 2d 826, 832 (C.A. 6)), where it was said: "Even though such statements may be expressive of opinon only, if their reasonable tendency is coercive in effect, they are violative of Section 8(a)(1)." It should be noted, however, that the statements in the Kingsford case were reaffirmed by the president of the Company in an address to the employees on the eve of a representation election, which poses a situation far different from the comments shown to have been made by the four minor supervisory employees in the instant case.

We therefore set aside and deny enforcement of that part of the Board's order holding the Company to be guilty of §8(a)(1) violations.

(i) The Union challenges the action of the Trial Examiner in granting a motion by the General Counsel to strike the names of four strikers from the complaint over the objection of the charging party. The motion of the General Counsel was as follows: "I move to delete those persons because in view of the General Counsel, they have engaged in misconduct which disqualifies them from reinstatement." It is charged that the Board was in error in allowing the issue of the misconduct and reinstatement rights of these four strikers to have been decided unilaterally by the General Counsel, rather than to have made the decision itself after consideration of the testimony and the evidence.

The record shows that three of the strikers in question were fined $100 each by the Common Pleas Court of Butler County, Ohio, on October 11, 1960, for contempt of Court in threatening, assaulting and subjecting to physical violence employees of the Company, and one of them was found guilty by a jury of assault and battery and fined $100 on November 28, 1960.

Under the provisions of § 10(b) of the Act, 29 U.S.C. § 160(b): "Any such complaint may be amended by the

member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon." Under § 3(d), 29 U.S.C. § 153 (d), which was enacted subsequently, "The General Counsel of the Board . . . shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 160 of this title, and in respect of the prosecution of such complaints before the Board."

There can be no doubt that the General Counsel himself could have stricken the four names from the motion to amend the complaint before submitting it, since he had the power to refuse to issue a complaint initially. N.L.R.B. v. Fred P. Weissman Co., 170 F. 2d 952 (C.A. 6), cert. denied, 362 U.S. 972; Anthony v. N.L.R.B., 204 F. 2d 832, 833 (C.A. 6). The Union argues that he had no right to reverse the procedure and do what otherwise amounted to the same thing by first offering the motion and then moving to strike the four names.

The General Counsel, like the Board, is charged with the responsibility of representing the public interest, not that of private litigants. When, in the prosecution of a complaint, facts come to his knowledge showing that there was insufficient basis for proceeding thereon, it was his duty to make a motion to amend. International Union of Electrical Workers v. N.L.R.B., 289 F. 2d 757, 760 (C.A.D.C.); American Newspaper Publishers Ass'n v. N.L.R.B., 193 F. 2d 782 (C.A. 7), cert. den. 344 U.S. 812.

We hold that the General Counsel gave a valid reason for striking the names of the four strikers and that the Trial Examiner properly granted the General Counsel's motion. Failure to hear evidence concerning the alleged misconduct of these four strikers did not constitute an abuse of discretion. We re-emphasize that, even if their names had not been stricken, and even if they had been found not to have been guilty of misconduct, these four strikers would not have been entitled to reinstatement because they had been permanently replaced prior to December 28, 1960.

(j) Finally the Company contends that the Board erred

in ordering it to continue to bargain with the Union after the certification year had expired and it had become doubtful whether the Union still represented a majority of the employees. The original election vote was only 122 to 112 for the Union. In light of the large number of strikers who were permanently replaced, there would be substantial ground for doubt concerning the Union's majority status. Jackson Mfg. Co., 129 N.L.R.B. 460; Titan Metal Mfg. Co., 135 N.L.R.B. 196. Since the Company had well-founded doubts about the Union's majority status, it could have refused to bargain at the expiration of one year after the Union's certification. Brooks v. N.L.R.B., 348 U.S. 96; N.L.R.B. v. Superior Fireproof Door & Sash Co., 289 F. 2d 713 (C.A. 2); N.L.R.B. v. Minute Maid Corp., 283 F. 2d 705 (C.A. 5); Celanese Corp of America, 95 N.L.R.B. 664; Stoner Rubber Co., 123 N.L.R.B. 1440. This assumes, as was true in this case, that the Company did not commit an unfair labor practice which was responsible for the Union's loss of majority. N.L.R.B. v. Superior Fireproof Door & Sash Co., supra; N.L.R.B. v. Florida Citrus Canners Cooperative, 288 F. 2d 630, 638, rev. and reman., 369 U.S. 404, initial decision aff'd, 311 F. 2d 541 (C.A. 5).

The General Counsel contends that because the Company was guilty of refusing to bargain in good faith during the last two and a half months of the certification year, the Board, in fashioning an appropriate remedy, could require the Company to continue bargaining. The Board asserts that this was a matter within its discretion, but does not contend that such a result is required by the Brooks case, supra, which held that the employer has a duty to bargain during the certification year notwithstanding the Union's loss of its majority status.

The Board's order, under the facts of this case, overlooks two practical and important facts. First, with the withdrawal of its superseniority proposal on August 10, 1961, the Company resumed good faith bargaining, meeting twice with the Union, without result, before the hearing in this case began on October 3, 1961. Secondly, we are faced with the Union's obvious loss of its majority status. A realistic view of the situation demonstrates the futility of requiring

the Company to continue negotiations with this Union, Perry Coal Co. v. N.L.R.B., 291 F. 2d 126, 128 (C.A. 7), N.L.R.B. v. Florida Citrus Canners Cooperative, supra. unless and until the Union has been duly certified as bargaining representative following a new election, N.L.R.B. v. Superior Fireproof Door & Sash Co., supra.

It is appropriate to note here a statement by Judge Friendly in the Superior Fireproof Door case: "Nor may we forget that the interests to be protected are primarily those of the employees, importantly including, of course, their right to effective representation, rather than of the union itself." 289 F. 2d at 724.

In view of the lengthy good faith bargaining which has transpired, the expiration of the certification year, and the Union's loss of its majority status, we hold that the Company is no longer required to bargain with this Union. This part of the order of the Board is set aside and enforcement of the Board's order in this respect is denied.

Petitioners have raised certain other points which we find not to be well taken.

Accordingly enforcement of the order of the Board is denied with respect to the alleged Section 8(a)(1) violations and insofar as the Company is directed to continue negotiations with the Union. In all other respects enforcement of the order is granted.

* * * * * *

O'SULLIVAN, Acting Chief Judge, dissenting: I am unable to agree with my brothers' disposition of the Statute of Limitations questions involved. The statute, §10 (b) of the Act, Title 29 U.S.C.A. §160 (b) reads in part as follows:

> "*Provided* That no complaint shall issue *based upon any unfair labor practice* occurring more than six months prior to the filing of the charge with the Board . . ." (Emphasis supplied)

The Board's findings of an 8(a)3 violation—discrimination in regard to hire—and an 8(a)(5) violation—refusal to bargain—Title 29, U.S.C.A. §158(a)3 and 5, were both "based upon" conduct of respondent which occurred on December 28, 1960. As to the 8(a)5 violation, no charge was ever made "based upon" such conduct and as to the 8(a)3 violation, no charge "based upon" such conduct was filed within six months of December 28, 1960.

Relying on NLRB v. Fant Milling Co., 360 U.S. 301, the Board found that some charges of unfair labor practice, made prior to the December 28, 1960 conduct, permitted it to consider this latter conduct under the earlier charges. Therefore, it argued that such earlier charges tolled the running of the Statute of Limitations as to the 8(a)5 violation: I am unable to follow this reasoning. Neither Fant nor National Licorice Co. v. NLRB, 309 U.S. 350, also relied upon by the Board, had anything to do with the Statute of Limitations. Fant merely held that it was permissible for the Board, in passing upon a charge of unfair labor practices, to consider conduct occurring subsequent to the date of the original charge where the subsequent unfair labor practices are "related to those alleged in the charges" and "grow out of them while the proceeding is pending before the Board."

In the case at bar, the conduct described in the earlier charges was found not to amount to unfair labor practices. In Fant, the conduct described in the earlier charges was found to be illegal and that which occurred after the filing of the original charge was considered as merely a prolongation of the earlier illegal conduct.

I cannot understand how charges made on September 23, October 20, and December 7, 1960, and found to be groundless can be used to toll the running of the statute against events which had not yet occurred and which were never made the subject of a charge of unfair labor practice. Considering that neither Fant nor National Licorice dealt with a question of limitations, I cannot find them to be pertinent here.

As to the 8(a)3 violation, under which the Board ordered reinstatement of some 38 employees, the unfair labor practice that the complaint was "based upon" was the December 28, 1960 conduct of respondent causing "the bargaining negotiations to reach an impasse." Such conduct, so held the Board, converted what had been an economic strike into an unfair practice strike. The charge which sought the order for reinstatement under 8(a)3 was not made until September 23, 1961, some nine months after the unfair labor practice of December 28, 1960. My brothers hold that the statute did not begin to run on the 8(a)3 violation until August 3, 1961 when replaced employees were denied reinstatement. Any right to such reinstatement existed only because the unfair labor practice of December 28, 1960 converted the strike into an unfair labor practice strike as of that date. That was the conduct that the September 13, 1961 charge was "based upon." It was an "unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . ." § 10(b).

The Board and my brothers follow the case of NLRB v. Brown and Root, Inc., 203 F. (2d) 139, 146 (CA 8, 1953). While it contains some facts different from the case before us, I recognize the Brown and Root case as contrary to my view. I respectfully disagree with its holding. I prefer the reasoning of Greenville Cotton Oil Co., 92 NLRB 1033, affirmed sub. nom. American Federation of Grain Millers v. NLRB, 197 F. (2d) 451 (CA 5, 1952). In our case there was nothing to prevent the employees' union, which was quite active in this regard during the strike, to have made a timely charge that respondent's December 28, 1960 conduct was an unfair labor practice. Such charge would have tolled the statute and would permit a complaint "based upon" it to be issued should respondents thereafter deny reinstatement to strikers replaced after the strike had become an unfair labor practice strike. The majority holding would expose an employer to the sanctions imposed for unfair labor practice no matter how long after their occurrence the offended employees wait to make a charge and seek a remedy. I believe that the language of the United States Supreme Court in Machinists Local v. NLRB, 362 U.S. 411 supports my view. The court there said:

"[A] finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the Section 10(b) proviso." 362 U.S. 422.

I would hold that any charge based on the December 28, 1960 unfair labor practice is based by § 10(b) of the Act.

APPENDIX C

61 Stat. 136, 29 USC sec. 151. "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining. . . ."

61 Stat. 140, 29 USC sec. 158(a). "It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

61 Stat. 140, 29 USC sec. 158(d). "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

61 Stat. 146, 29 U.S.C. sec. 160(a). "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . ."

61 Stat. 146, 29 USC sec. 160(c). ". . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall . . . issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act. . . ."

61 Stat. 146, 29 USC sec. (f). "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals . . . by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . ."